income consumer groups would most likely not have had access to voice messaging services if the BOCs had been required to provide service through a separate affiliate.[25]

3. Existing Nonstructural Safeguards and Enforcement Mechanisms Are Adequate To Achieve the Commission's Goals.

Structural safeguards are not necessary to protect competition *or* competitors. *Non*structural safeguards have proved appropriate in similar contexts to prevent misallocation of costs or discrimination, the concerns driving the structural separation proposal. Thus, to ensure that an incumbent LEC (in most contexts, a BOC) is unable to cross-subsidize an unregulated service from its basic telephone operations, the Commission has primarily (1) established effective accounting rules and cost-allocation standards; (2) required carriers to file cost-allocation manuals; (3) required audits by independent auditors; (4) established detailed reporting requirements and an automated information repository; and (5) performed on-site audits itself. *See, e.g.*, *Computer III Remand Order* ¶ 46. In the enhanced services context, the Commission concluded that this "comprehensive system of cost accounting safeguards has worked well and . . . effectively protects ratepayers against cross-subsidization by the BOCs." *Computer III Remand Order* ¶ 46. That conclusion was upheld on appeal. *See California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994) ("*California III*"). The Commission noted that "implementation of LEC price cap regulation . . . reduces BOC incentives to cross-subsidize enhanced services with basic services," because, under price-cap regulation, "a carrier is not able automatically to recoup misallocated nonregulated costs by raising basic service rates." *Computer III Remand Order* ¶ 55. The subsequent elimination of the "sharing mechanism," under which carriers could potentially profit from cross-subsidization through the sharing of earnings, completely eliminated

[25] *See id.* at III-9.

the incentive to misallocate costs.[26] There is nothing that would make it any easier for an incumbent LEC to cross-subsidize its provision of advanced data services than enhanced services.

Similarly, the Commission has relied on nonstructural requirements to guard against discrimination. In the context of enhanced services, the Commission determined that (1) "open network architecture," (2) nondiscrimination reporting requirements, (3) network disclosure rules, and (4) CPNI disclosure rules "should effectively protect against anticompetitive conduct by the BOCs toward competing ESPs." *Computer III Remand Order* ¶¶ 57-59. Equivalent protections are already applicable to incumbent LECs' provision of advanced services. Section 251(c)(3) requires unbundled access to bottleneck facilities, such as loops, providing an even more procompetitive mechanism than ONA; section 251(c)(5) preserves the network disclosure requirement; and section 222 restricts incumbents' use of CPNI. To the extent additional protections are necessary, the Commission remains free to impose nondiscrimination reporting requirements equivalent to those used in the enhanced services context.[27]

In addition, the structural separation proposal ignores the fact that Congress has *already* created a comprehensive enforcement mechanism — the section 252 arbitration and

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26/ *See Price Cap Performance Review for Local Exchange Carriers, Access Charge Reform*, Fourth Report and Order, 12 FCC Rcd 16642 ¶¶ 147-55 (1997), *appeals pending sub nom. United States Telephone Ass'n v. FCC*, No. 97-1469 (D.C. Cir. 1998).

27/ Of course, as shown in U S WEST's comments on the *Advanced Services NOI*, U S WEST faces stiff competition in the developing advanced services market, not only from other telecommunications carriers, but from cable service providers and several other entities not subject to Title II regulation at all. *See id.* at 10-13. Such competition vastly diminishes the possibility that a carrier could profit through discrimination.

appeal process — to address the very problem that the Commission is attempting to solve.[28/] Ensuring that an incumbent LEC gives its rivals nondiscriminatory access to the bottleneck network elements and collocation necessary to provide competitive xDSL services is no different from enforcing section 251(c) in the context of ordinary voice services: An incumbent's incentives to unbundle a loop for a competitor are exactly the same whether the competitor plans to use the loop for voice or data. Accordingly, there is no reason to think that the detailed enforcement process that Congress deemed effective for voice services — allowing competitors to bring discrimination and compliance complaints before state regulators and, if necessary, federal district courts, *see* 47 U.S.C. §§ 272(b)-(e) — would somehow be inadequate when applied to data services. On the contrary, the Commission has repeatedly asserted its faith in the section 252 enforcement mechanism and declared its utility in the advanced services context.[29/]

28/ In the enhanced services context, the Commission recently determined that "the de-regulatory, pro-competitive provisions of the 1996 Act, and the framework the 1996 Act set up for promoting local competition" support the application of nonstructural safeguards in lieu of structural separation. *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Further Notice of Proposed Rulemaking, CC Docket No. 95-20 ¶ 51 (rel. Jan. 30 1998).

29/ *See, e.g., Advanced Services Order* ¶ 55 (stating that CLECs denied nondiscriminatory access to xDSL-capable loops can pursue remedies before the appropriate state commissions); *Local Competition Order* ¶ 137 (noting that "[s]tate commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251"). Similarly, the Common Carrier Bureau cited the existence and effectiveness of the section 252 process as a reason not to begin an investigation into whether GTE was adequately unbundling the elements of its DSL services and providing interconnection for advanced services. *See GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148*, Order Designating Issues for Investigation, CC Docket No. 98-79 ¶ 19 (CCB Aug. 20, 1998) ("If it becomes apparent that GTE is not meeting these obligations and competitors have difficulty negotiating interconnection agreements, obtaining access to unbundled network elements, or purchasing telecommunications service for resale pursuant to sections 251 and 252, competitors may seek mediation pursuant to section 252(a)(2) or

(continued...)

Where Congress provides a detailed and comprehensive mechanism for enforcing a statutory duty, one that the Commission has previously found to be effective, the Commission cannot blithely reverse itself, declare Congress's chosen scheme to be inadequate, and unilaterally impose a different one.

This is especially true where the alternative enforcement mechanism that the Commission is proposing is one that Congress has clearly *declined* to adopt. Congress was familiar with separate affiliate requirements and imposed them in several limited contexts, *see, e.g.*, 47 U.S.C. §§ 272(a)-(b), 274(b), but it did not believe them necessary to enforce section 251(c) in the usual run of cases. It did not, for example, require incumbent LECs to provide ordinary local voice services through separate retail affiliates. The Commission should not second-guess Congress's choices by extending structural separation to contexts in which Congress did not deem it necessary.

More fundamentally, as the Commission has acknowledged in the enhanced services context, even if forsaking structural separation *did* inhibit competition to some extent (and there is absolutely no indication that it will in the advanced services context), such costs are outweighed by the significant consumer welfare gains achieved by allowing incumbent LECs to take advantage of the efficiencies of integrated operation. *See Computer III Remand Order* ¶¶ 98-109.[30/] The Commission recognized that bringing enhanced services to the mass market

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29/ (...continued)
arbitration pursuant to section 252(b)."), *application for review pending* (filed Sept. 18, 1998).

30/ *See Computer III Remand FNPRM* ¶ 105 ("to the extent that nonstructural safeguards may involve any small diminution in protection against cost-subsidization and discrimination, we find that the danger of this is outweighed by the benefits of integration"). Earlier in the same docket, the Commission concluded that "even if structural separation has a (continued...)

was simply more important that insisting on an absolutely level playing field. *Id.* Yet here, in its zeal to promote competition, the Commission appears to have lost sight of that goal. The Commission should craft its policies in light of the fact that incumbent LECs "cannot fully realize their potential in the [advanced] services marketplace unless they are permitted to capture the legitimate efficiencies available to them." *Id.* at 100.

B. Even If the Structural Separation Proposal Were Adopted, the Degree of Separation Contemplated Is Unwarranted.

As shown in Part II.A above, the costs associated with structural separation would far exceed the benefits produced by incumbent LECs' integrated provision of voice and data services, and sufficient protections exist in rules that already apply to incumbent LECs. Even if some degree of structural separation could be justified, however, the Commission's blueprint for a separate data affiliate far exceeds that threshold. Moreover, the Commission's reliance on the section 272 interLATA affiliate as a model for structural separation is unwarranted.

If the Commission adheres to its tentative plan to condition regulatory relief on some form of structural separation, the Commission at most should require that a separate data affiliate comply with the requirements set forth in the *Competitive Carrier* Fifth Report and Order,[31/] as modified by the *LEC Classification Order*.[32/] The *Fifth R&O* identified three

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30/ (...continued)
net positive benefit in an absolute sense, if alternative safeguards are on the whole more beneficial to society, then it would be incumbent on [the Commission] to replace structural separation with those alternative safeguards." *Third Computer Inquiry* ¶ 75.

31/ *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, Fifth Report and Order, 98 FCC2d 1191 (1984) ("*Fifth R&O*").

32/ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in*
(continued...)

separation requirements with which an independent LEC's interLATA affiliate must comply to qualify for nondominant treatment: Such an affiliate must (1) maintain separate books of account, (2) not own transmission and switching facilities jointly with its affiliated exchange company, and (3) acquire any services it obtains from its affiliate exchange company at tariffed rates, terms, and conditions. *Id.* ¶ 9. The *LEC Classification Order* subsequently modified the third requirement to allow an independent LEC's interLATA affiliate to take exchange services either under tariff or on the same basis as requesting carriers that have negotiated interconnection agreements under section 251. *Id.* ¶ 164.

These requirements, together with the Commission's nonstructural safeguards, are more than sufficient to prevent cross-subsidization and discrimination without any need for the degree of separation contemplated for a section 272 affiliate. As noted above, the pure price-cap regime now applicable to U S WEST, which dispenses with the sharing of earnings among LECs, already eliminates U S WEST's incentive to cross-subsidize an unregulated affiliate. *See supra* n.26. The additional requirement to maintain separate books of account would make it impossible to shield any misallocation of costs, and the prohibition against joint ownership of switching and transmission facilities would further deprive U S WEST of any opportunity to engage in any such misallocation.

Similarly, even if nonstructural safeguards were not adequate to prevent all instances of discrimination, and if the Commission deemed its enforcement power an inadequate deterrent, maintaining separate books of account would facilitate the detection of discriminatory conduct. And the joint ownership prohibition, in tandem with the requirement that elements be

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32/ (...continued)
the LEC's Local Exchange Area, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*").

purchased pursuant to tariffed rates and terms (or pursuant to contracts negotiated at arms' length by other carriers), would ensure equality in the affiliate's use of the incumbent LEC's bottleneck facilities.

Commission precedent supports the use of this more limited separation model, if structural separation must be a condition of regulatory relief at all.[33] With respect to incumbent LECs' provision of commercial mobile radio services ("CMRS") — which, like advanced data services, the Communications Act itself does not require to be provided through a separate affiliate — the Commission has adhered to the *Fifth R&O* model. Thus, incumbent LECs offering in-region broadband CMRS services must maintain separate books of account, may not jointly own transmission or switching facilities, and must provide any services to the CMRS affiliate on a compensatory arms' length basis.[34] The Commission determined that requiring a separate affiliate to have officers and employees separate from the incumbent LEC is not necessary to prevent anticompetitive discrimination and cost misallocation. *Id.* ¶ 64. To the contrary, the Commission acknowledged that "a flat ban on common employees will unnecessarily impose an efficiency cost upon incumbent LECs, and . . . eschewing these efficiencies is not outweighed by any competitive benefit from such a ban." *Id.* The NPRM nevertheless would impose such a flat ban. *Id.* ¶ 96. It also would forbid the incumbent LEC

33/ Notably, even the *Fifth R&O* model is far inferior to permitting incumbent LECs to provide integrated voice and data services through their existing corporate structures without being subject to unbundling and resale obligations. A *Fifth R&O* data affiliate would be forced to purchase loops at tariffed rates in order to provide integrated services, just as CLECs must. Having to pay for loops would prevent incumbents from serving the mass market, just as it has deterred CLECs from deploying services in smaller and more rural communities.

34/ *Amendment of the Commission's Rules To Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd 15668 ¶ 38 (1997).

from performing any operating, installation, or maintenance functions for affiliate. *Id.* There is no reason to "eschew efficiencies" by imposing these limitations in the advanced services context. Indeed, the mandate in section 706 to encourage the deployment of advanced services on a reasonable and timely basis demands a regulatory regime that *promotes* integrative efficiencies.

Rather than looking to the enhanced services context or the CMRS context for guidance, the NPRM has modeled the separate affiliate proposal on the blueprint for a section 272 affiliate. That model simply is inapposite.[35/] The 1996 Act affirmatively imposes a separation requirement for the BOCs' provision of long distance services. The lack of any comparable statutory mandate with respect to the BOCs' or other incumbents' provision of advanced services makes any separate affiliate proposal suspect, *see supra* at 24; and the NPRM's proposed extension of section 272 to a wholly different context is impossible to justify. The section 272 model is further made inapposite by the fact that section 272 applies to a type of service the BOCs never before have been allowed to provide, and which is technically separable from local exchange service, while the Commission's separation proposal addresses services incumbent LECs *already are providing*. Thus, incumbent LECs' provision of those services already is subject to protections designed to prevent cross-subsidization and discrimination. U S WEST believes that the Commission should not condition regulatory relief on *any* separation requirement, but, if it does, its current proposal plainly exceeds any justifiable level of safeguards and would needlessly sacrifice the interests of most American consumers.

35/ While section 272 should not be used as a model for any separate data affiliate, its three-year sunset provision, 47 U.S.C. § 252(f)(1), should be regarded as the outer limit for determining the length of time during which the separate affiliate requirement would apply.

C. The NPRM's Tentative Conclusions Regarding the Successor/Assign Rule Further Ensure that Structural Separation Would Fail To Facilitate the Deployment of Advanced Services.

The Commission's structural separation proposal plainly would be self-defeating if section 251(c) obligations were imposed on the data affiliate. Nevertheless, the Commission's analysis of the successor/assign rule in section 251(h) would seem to guarantee this result. As noted above, a separate affiliate requirement is too costly and inefficient in any event. But the Commission's proposal that the transfer of an incumbent's existing packet-switched facilities to its affiliate would make the affiliate an assign[36] — and thus, for regulatory purposes, an incumbent LEC — would severely penalize any incumbent LEC that has made significant investments in advanced facilities. This is particularly an issue for U S WEST, which has been an industry leader in deploying advanced services capability.[37] In order to obtain the regulatory freedom that would justify the high costs of creating a separate affiliate, U S WEST would be forced to have its affiliate duplicate U S WEST's existing packet-switched network. Requiring carriers to expend scarce resources to duplicate facilities obviously would not assist in the rollout of advanced services to rural, high-cost areas.

Even if the Commission were to permit the transfer of equipment and other assets, duplication of facilities still would be a foregone conclusion, absent further Commission action. Some states almost certainly would require U S WEST to continue providing — as an incumbent

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[36] *See Advanced Services NPRM* ¶ 106.

[37] U S WEST is in the process of deploying asymmetric digital subscriber line ("ADSL") services (capable of transporting data at speeds of 256 kbps to 7 Mbps) in 226 wire centers in 43 cities across its 14-state service region. It has already deployed ADSL in 215 of these wire centers. U S WEST is also deploying advanced service facilities outside of its region; its !nterprise unit is now the third largest provider of frame-relay services nationwide. *See* U S WEST Comments on *Advanced Services NOI*, at 8-9.

LEC — all data services that it has tariffed under state law. Accordingly, unless the Commission both allows asset transfers *and* establishes that state commissions may neither interfere with those transfers nor impose continuing service obligations on U S WEST, the separate affiliate proposal will be entirely unworkable.

1. The Commission Should Allow Facilities Transfers under a Successor/Assign Standard That Permits the Transfer of Nonbottleneck Network Assets.

If the Commission decides that advanced services facilities must be unbundled, making structural separation the only avenue to regulatory relief, it should nevertheless permit incumbent LECs to transfer *nonbottleneck* network elements and other nonessential assets to its data affiliate without causing that affiliate to become an assign.[38] The NPRM's tentative conclusion that "a wholesale transfer of . . . facilities [used to provide advanced services] would make an affiliate the assign of the incumbent LEC," *Advanced Services NPRM* ¶ 106, resulted from its reliance on the successor/assign standard established in the *Non-Accounting Safeguards Order*.[39] That standard provides that an incumbent's transfer of *any* elements that must be provided on an unbundled basis would make the affiliate an assign. *See id.*

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[38] If the Commission and state authorities agree that advanced services equipment need not be unbundled, then such equipment may be transferred without making the affiliate an assign. The successor/assign standard proposed in the *Advanced Services NPRM* treats an affiliate as an assign only if an incumbent transfers network elements that *must be provided on an unbundled basis*. *Id.* ¶ 105. Thus, a decision not to require unbundling is also a decision that equipment transfers would not subject a data affiliate to incumbent LEC regulation. Of course, a decision not to require unbundling also would eliminate the rationale for creating a separate affiliate, making the question of equipment transfers academic.

[39] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905 ¶ 309 (1996) ("*Non-Accounting Safeguards Order*").

The successor/assign standard adopted in the *Non-Accounting Safeguards Order* plainly is not appropriate here. There, the Commission determined that a BOC's section 272 affiliate would be an assign if the BOC transferred to the affiliate its local exchange and exchange access facilities. *Id.* ¶ 309. The purpose of that ruling was to ensure that incumbent LEC obligations apply wherever the *reason* for those obligations applies — that is, the control of essential bottleneck facilities. That purpose is not relevant here, however, because advanced data facilities do not have bottleneck characteristics. *See supra* at 5-8. Thus, a BOC affiliate to which *nonbottleneck* facilities are transferred should *not* be treated as an incumbent LEC, because in that case the affiliate would not own the facilities that gave the transferor any attributes of an incumbent LEC.

The central inquiry under section 251(h) thus should be whether a transfer of assets to an affiliate involves bottleneck facilities.[40] The Commission acknowledged in the *Advanced Services NPRM* that the question "whether an affiliate is a successor or assign is ultimately fact-based." *Id.* ¶ 104. The courts' understanding of the concept of successorship indicates that the relevant facts concern the degree of continuity between the transferor and transferee. The question of successorship has arisen frequently in the labor law context, because unions have asserted various claims against alleged "successors" to collective bargaining agreements. *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987);

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[40] To the extent that this focus on transferring bottleneck facilities constitutes a different successor/assign test than the one proposed by the NPRM, it is hardly novel that different tests would determine whether a section 272 affiliate, on the one hand, and a data affiliate, on the other, is a successor or assign. The Commission itself cited *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262 n.9 (1974) (cited in *Advanced Services NPRM* ¶ 104), which notes that "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context. A new [corporate entity], in other words, may be a successor for some purposes and not for others."

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964). The Supreme Court's "substantial continuity" test examines "whether the business of both [entities] is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River*, 482 U.S. at 43. Similarly, the Supreme Court has noted that the meaning of "successor" under the "general rule of corporate liability" turns on whether the new entity is "merely a continuation" of the old. *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 182 n.5 (1973). This focus on continuity underscores the importance of the distinction between a transfer of bottleneck and nonbottleneck facilities. A data affiliate to which the incumbent LEC transferred only nonessential facilities would be independent from its parent, rather than a continuation of it, as evidenced by the fundamental difference in their core lines of business. Under general principles of successorship, such differences easily defeat any suggestion that a data affiliate is an incumbent LEC's assign.

The principles underlying both the Commission's successor/assign precedent and these decisions of the Supreme Court demonstrate that preventing an incumbent LEC from transferring nonbottleneck facilities to its data affiliate would serve no legitimate interest. Congress included successors and assigns within the definition of "incumbent local exchange carrier" in section 251(h) to prevent circumvention of the duties imposed throughout section 251. *Cf. Non-Accounting Safeguards Order* ¶ 309 (describing transfer rules as necessary to prevent circumvention of section 272 requirements). Congress did not enact section 251(h) to expand the substantive reach of the duties in sections 251(b) and (c). Circumvention of section 251 would occur only if an incumbent LEC could escape regulation by the simple device of a transfer of assets to new entity that is a substantial continuation of the old. As noted above, a LEC's data affiliate would *not* be a substantial continuation of the traditional circuit-switched network provider, but rather would offer new packet-switched services over a network of nonbottleneck electronics. Thus, an affiliate's receipt of such nonessential facilities would in no way implicate, much less frustrate, the competitive safeguards the successor/assign test exists to protect. Far from creating any unfair advantage, allowing an incumbent LEC to transfer assets, including network elements, to a data affiliate — for a fixed period of time after creation of the affiliate[41/] — would simply give the incumbent an incentive to create the affiliate. And it would accelerate the deployment of advanced services to all Americans. The fact that the affiliate acquired advanced electronics from a LEC that owns other, bottleneck facilities is irrelevant. So long as the *bottleneck* facilities are not transferred, there is no reason to classify the affiliate as an assign.[42/]

Finally, even under the NPRM's proposed successor/assign test, any assets *other than network elements* that an incumbent may wish to transfer — employees, customer accounts, or brand names — should be transferable without making the affiliate a successor or assign. The

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41/ U S WEST urges that incumbent LECs be given one year following CLEC certification to transfer all necessary advanced services equipment to the data affiliate. Any shorter period might make completion of necessary legal and logistical preparation difficult. After that time, the Commission could presume that an uncompensated transfer runs afoul of the prohibition against the affiliate's receipt of assets other than on an arms' length basis. An incumbent at that point would be obligated to show that the transfer legitimately was part of the corporate formation process rather than an act of prohibited discrimination to avoid making the affiliate an assign.

42/ Accordingly, while U S WEST opposes the Commission's suggestion that advanced services facilities would be transferable to an affiliate without making the affiliate an assign only on a *de minimis* basis, *Advanced Services NPRM* ¶ 108, U S WEST concurs with the Commission that permissible transfers would include only nonbottleneck equipment, and not loops, *see id.*

proposed standard speaks only to "*network elements* that must be provided on an unbundled basis." *See Advanced Services NPRM* ¶ 105 (emphasis added); *Non-Accounting Safeguards Order* ¶ 309 (emphasis added). Nonphysical assets plainly fall outside that restriction.

2. For the Separate Affiliate Proposal To Have Any Realistic Chance of Success, the Commission Must Preempt State Law That Would Impede Facilities Transfers.

Even if the Commission were to permit incumbent LECs to transfer nonbottleneck facilities to an affiliate, an incumbent's ability to transfer assets still would face tremendous practical obstacles at the state level. A decision by the Commission not to prohibit asset transfers easily could be nullified because some states independently restrict asset transfers.[43] And some states almost certainly will require U S WEST itself to continue providing the advanced services that it already has tariffed under state law or has agreed to provide pursuant to negotiated interconnection or resale agreements. If that occurs, the ability to transfer assets would not make the creation of a separate data affiliate even remotely advantageous for U S WEST. U S WEST would have to maintain duplicate sets of advanced services facilities and services — one in the incumbent LEC, one in the new affiliate — with all of the attendant inefficiencies such duplication entails. Even apart from asset transfer issues, U S WEST's recent attempts to certify data CLECs in several states have been met with substantial resistance.

Thus, while the NPRM "encourage[s] states to treat [an incumbent's] affiliate equivalently to any other competing carrier offering advanced services," *Advanced Services NPRM* ¶ 116, simple exhortations will not eliminate the risk that states would effectively bar incumbent LECs from establishing data affiliates. The separate affiliate proposal will have no

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[43] In U S WEST's region, Arizona, Colorado, Iowa, North Dakota, Oregon, and Washington all require approval from the state commission for an asset transfer to an affiliate.

prospect of being workable unless the Commission both permits facilities transfers *and* preempts state law that interferes with that process. In particular, the Commission should preempt any state-imposed prohibitions against facilities transfers, and any state requirements that would burden or interfere with such transfers, whether directly or indirectly. The latter category must be defined to include any requirement that U S WEST itself continue to provide advanced data services for which it has filed tariffs following the creation of a data affiliate pursuant to the Commission's rules.

III. MOST OF THE NPRM'S CONTEMPLATED "MEASURES TO PROMOTE COMPETITION IN THE LOCAL MARKET" WOULD NEEDLESSLY INHIBIT THE DEPLOYMENT OF ADVANCED SERVICES.

The bulk of the *Advanced Services NPRM* is dedicated to proposals that would hamper the deployment of advanced services by increasing, rather than decreasing, the regulatory burdens confronting incumbent LECs. Several of the contemplated rules would be technically infeasible, and many others simply are unnecessary in light of the 1996 Act's mandated state mediation and arbitration processes that are designed to address the same issues. Moreover, the proposed imposition of one-size-fits-all solutions overlooks the many local variations that exist with respect to available collocation space, network configuration, and related issues. Finally, in the one instance where the NPRM does contemplate a means of facilitating the rollout of advanced services — interLATA relief — its proposals are far too limited to be of any help.

A. Most of the Proposed Collocation Requirements Are Unnecessary or Unlawful.

U S WEST comments below on questions relating to (1) national standards, (2) collocation of switching equipment, (3) collocation of other equipment, and (4) allocation of collocation space. Most of the proposals in these areas would increase regulatory costs without any competitive justification, and some are expressly barred by the 1996 Act.

1. National Collocation Standards

The proposal to adopt national minimum standards for collocation aims to fix a process that is not broken. Requesting carriers currently may obtain collocation space from U S WEST pursuant to clearly defined terms and conditions. Appropriately (and as required by the 1996 Act), disputes regarding allocation of space, provisioning time frames, and other issues are resolved through private negotiations and, in some cases, mediation and arbitration at the state level. Any attempt to resolve collocation issues and complaints through federal intervention would be misguided. There are vast differences among wire centers and among the various types of remote equipment terminals, in terms of the equipment used, building capacity, and power availability. Rules must be tailored to particular situations. That is precisely what the state arbitration process is designed to and successfully does accomplish.

2. Collocation of Switching Equipment

While U S WEST and other incumbent LECs may, in some instances, permit new entrants to collocate remote equipment that performs both switching and multiplexing functions, the 1996 Act does not permit the Commission to impose a requirement to collocate any switching equipment. Congress has authorized the Commission to require only "physical collocation of equipment *necessary* for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6) (emphasis added). Collocated switching equipment plainly is not "necessary" for interconnection or access to network elements under any ordinary definition of the word. Moreover, the Commission's authority must not be stretched beyond what the statute clearly warrants, because to do so would take property that Congress has not authorized the FCC to take, and thereby risk exposing the federal government to actions for just compensation. *See Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994).

The Commission previously has argued that it is entitled to wide latitude in interpreting section 251(c)(6).[44] In fact, in this context, the exact opposite is true, for the reasons stated in *Bell Atlantic*. As noted above, physical collocation of switches indisputably effects a taking of private property. *See Loretto*, 458 U.S. at 426. Such a taking could subject the federal government to a compensation obligation that Congress did not intend. *Bell Atlantic*, 24 F.3d at 1445-46.[45] The Commission's collocation requirement therefore must be reviewed under the "strict test of statutory authority" applied by the *Bell Atlantic* court, *id.* at 1447, and not under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Bell Atlantic*, 24 F.3d at 1445 ("Ordinarily [*Chevron*] would supply the standard for assessment of the claimed authority, but not so here," where the threat of encroachment on Congress's exclusive power to raise revenue looms).

The "strict test" requires that section 251(c)(6) "supply a clear warrant" to require physical collocation of switching equipment. *Bell Atlantic*, 24 F.3d at 1446. The section does no such thing. The Commission has conceded that, "read most strictly," necessary as used in section 251(c)(6) does *not* mean "'used' or 'useful'"— the definition it nevertheless adopted.

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[44] *See Local Competition Order* ¶ 579 (concluding that FCC may require physical collocation of any equipment that is either "used" or "useful" — as opposed to required, essential, or indispensable).

[45] The *Bell Atlantic* court made clear that an action for compensation is available under the Tucker Act unless Congress has unambiguously withdrawn that remedy, which it has not done here; and the fact that requesting carriers pay tariffed rates for collocation does not preclude potential government liability under the Tucker Act. *See id.* at 1445 nn.2, 3.

Local Competition Order ¶ 579. Rather, strict adherence to the statutory text compels the conclusion that "necessary" means "required," "essential," or "indispensable."[46] Therefore, only where collocation of equipment is essential may it be required. But interconnection easily can be achieved regardless of where a carrier's switching equipment is located. U S WEST's competitors currently house ATM switches on their own premises or in space leased from an Internet service provider, and there is no technical impediment to linking such equipment to U S WEST's network or to other network elements (their own or U S WEST's) by high-capacity transmission links. That a particular competitor might, for business reasons, *prefer* to move its switching equipment onto U S WEST's property is irrelevant, because wanting collocation space and *needing* it for interconnection are clearly distinct, and the Act imposes a duty on U S WEST only when the latter threshold is met.[47] Accordingly, far from supplying a "clear warrant" for the FCC's collocation order, section 251(c)(6), properly construed, does not allow it. A decision by the Commission to order physical collocation of switching equipment would, as in *Bell Atlantic*, "amount[] to an allocation of property rights quite unrelated to the" requirements of the Act. 24 F.3d at 1446.

3. Collocation of Other Equipment

a. U S WEST offers new entrants Single Point of Termination ("SPOT") collocation that eliminates the need for cages and thereby facilitates cross-connections

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[46] *See Random House Dictionary of the English Language* 1284 (2d ed. unabridged 1987); *Local Competition Order* ¶ 579 (necessary "could be interpreted to mean 'indispensable'").

[47] For the same reasons, the Commission is plainly correct not to require incumbent LECs to collocate equipment used to provide enhanced services. *See Advanced Services NPRM* ¶ 132. The Act does not grant new entrants a license simply to set up shop on an incumbent's premises.

of equipment among different CLECs. *See Advanced Services NPRM* ¶ 133 (seeking proposals to enable new entrants to establish cross-connections). SPOT collocation permits CLECs to aggregate unbundled network elements at a single U S WEST frame in the central office. SPOT collocation also includes a common frame and tie cables in 100-pair increments (called expanded interconnection channel terminations) that serve as a point of interface for multiple CLECs' network elements.

b. The Commission appropriately proposes that incumbent LECs be permitted to require collocated equipment to meet safety requirements intended to avoid endangering other equipment and the incumbent's network. *See Advanced Services NPRM* ¶ 134. That proposal also effectively answers the Commission's query "whether competitive LECs should be required to use NEBS-compliant equipment where the incumbent LEC uses NEBS-compliant equipment for equivalent functions." *Id.* ¶ 135. U S WEST currently uses equipment that complies with the National Equipment Building Standards ("NEBS"). It also requires that entrants' equipment comply with those standards. Its ability to do so is critical, because the effectiveness of protection against damage to equipment (U S WEST's or that of other entrants collocating on its premises) is only as good as the weakest link in the chain of interconnected facilities. If one entrant's equipment poses a safety risk in the event of a fire, or earthquake, or any other contingency, every carrier with equipment collocated in the same central office could suffer.

The existence of NEBS requirements obviates the need for U S WEST to list all approved equipment. *See Advanced Services NPRM* ¶ 134 (proposing listing requirement). Requiring U S WEST to compile its own list of approved equipment would not only be unnecessary, but extremely costly, because such a list would need constant updating in light of the pace of technological change. Moreover, the Commission should not adopt any new requirement for incumbent LECs to supply lists of equipment that they use. *See id.* The network disclosure requirement in section 251(c)(5), together with incumbents' general adherence to common standards (NEBS), again make such an obligation unnecessary.

4. Allocation of Collocation Space

The NPRM proposes to require incumbent LECs to offer collocation arrangements that minimize the amount of space needed by each new entrant seeking to provide advanced services. *See Advanced Services NPRM* ¶ 137. As the Commission recognized, U S WEST already offers cageless collocation to new entrants. *Id.* ¶ 139. However, U S WEST believes that the Commission should not adopt a rule *requiring* cageless collocation, or any similar arrangement, because state commissions are in a far better position to determine what duties individual incumbent LECs should have in this context. As noted above, national standards are ill-suited to resolving collocation issues because of significant differences among central offices in terms of network configuration and available space and power. Such differences also make it entirely inappropriate to presume that the use of a particular collocation arrangement in one location makes it technically feasible to offer the same arrangement elsewhere. *See id.* ¶ 139. And national regulation may thwart useful consensual developments: National standards likely would have stood in the way of U S WEST's negotiating SPOT frame collocation with CLECs.

a. U S WEST's implementation of cageless collocation makes it imperative for U S WEST to be able to take steps to ensure the security of its own and new entrants' facilities. The Commission appropriately determined in the *Local Competition Order* that incumbents should be permitted reasonable security measures to protect their equipment and ensure network reliability. *Advanced Services NPRM* ¶ 140 (citing *Local Competition Order* ¶ 598). Security issues will vary on a case-by-case basis, however, making it impossible for the Commission to determine which procedures are most appropriate. In some cases, where an entrant's equipment can be set aside in an area secured from the incumbent's facilities, minimal security will be required. In other cases, for example when cageless collocation is employed, the close proximity of an entrant's equipment and the incumbent's facilities may require escorts and/or electronic security measures. The Commission should not nationalize these questions, because no single solution to security issues can be adopted.

b. U S WEST often removes "obsolete" equipment to increase available space in central offices. Incumbent LECs, however, should not be required to remove equipment that will be moved to a different central office. U S WEST frequently moves equipment among central offices. Storing equipment that is not in use in one office until it can be moved elsewhere is economically and technically efficient. Incumbent LECs have strong economic incentives not to retain equipment that has no use in any office. Moreover, the Commission should not attempt to force incumbents to rid themselves of equipment the *Commission* deems "obsolete," because an incumbent may have a vastly different conception of that equipment's utility. The proposal would likely produce unproductive disputes that range far from any legitimate concern of the Commission. Such an assertion of control over incumbents' property also would raise serious constitutional questions.

c. Nor should the Commission impose a national standard for upfront space preparation charges. *See id.* ¶ 143. To the contrary, space preparation is a prime example of why national standards are inappropriate. Costs vary significantly by state and by central office because of geographically divergent labor rates, among other things. Indeed, no two U S WEST offices are identical in terms of space preparation requirements. In addition, incumbent LECs should not be put in the position of funding space preparation for new entrants, even temporarily. The Commission accordingly should not require incumbents to allocate space preparation costs in a manner that requires them to attribute some costs to possible future requesting carriers; should such carriers fail to materialize, the incumbents will have been forced to subsidize preparation costs that should have been borne by CLECs that did, in fact, collocate equipment on the incumbents' premises.

d. Similarly, any suggestion that the Commission should establish national presumptive reasonable deployment intervals for new collocation arrangements and expansion of existing arrangements, *see id.*, is misguided. Provisioning is inherently site specific and cannot be made to conform to a uniform deployment interval. State commissions are in the best position to address concerns about lengthy intervals, should such concerns arise. The intervals established by U S WEST to provide collocation are reasonable in light of the planning and provisioning intervals that apply to its own operations. CLECs are given clear notice of intervals and must plan accordingly. A new entrant may reasonably be required to obtain collocation space and place equipment before securing any customers in a central office area, just as a facilities-based carrier must have its network in place before it can begin providing service.

e. There is no basis for requiring an incumbent LEC that denies a collocation request because of space limitations to provide a state commission with detailed floor plans and also to permit a requesting carrier to tour its premises. *Id.* ¶ 146. States are capable of determining the legitimacy of claims of space exhaustion based on any detailed floor plans they require incumbents to provide; moreover, if any tour of an incumbent's premises is required, it should be conducted by a neutral party, to prevent security risks. All costs should be borne by the new entrant that requests a physical inspection.

f. Finally, one of the Commission's proposals with respect to transfers of assets to an affiliate also concerns allocation of collocation space. The Commission has tentatively concluded that, if it does permit equipment transfers without making the affiliate an assign, and there are space limitations on the incumbent LEC's premises, the affiliate should not be permitted to leave transferred equipment in its current location. *Id.* ¶ 110. That proposal, too, would impose needless costs and, more importantly, would disrupt customers' service. It would be senseless to remove equipment only to make the affiliate stand in line to reinstall it. Customers would suffer as a result, because the relocation of equipment necessarily interrupts service. The Commission should not permit its zealous promotion of competition to produce such an inefficient and socially costly result.

B. Most of the NPRM's Proposals Regarding Additional Local Loop Requirements Are Technically Infeasible, Contrary to the 1996 Act, or Both.

U S WEST comments below on questions relating to (1) national standards, (2) operating support systems ("OSS"), (3) loop spectrum management, (4) unbundling loop spectrum, and (5) unbundling digital loop carrier ("DLC")-delivered loops and subloop elements. As with the NPRM's collocation proposals, its proposals with respect to loops and OSS cannot be squared with technical realities or, in some cases, the 1996 Act.

1. National standards

National standards are poorly suited to managing loop-related issues. Technical feasibility issues vary with the equipment deployed in particular locations. For example, in the context of subloop unbundling, the possibility of unbundling subloop elements at Feeder

Distribution Interface ("FDI") locations must be considered on a site-specific basis because each FDI is unique in terms of cabinet space, surrounding space, and the availability for rights-of-way, among other things. Similarly, DLC-delivered loops employ different equipment that makes uniform rules inappropriate. In any event, with respect to DLC systems, none of the different DLC configurations at U S WEST's remote terminal sites would permit entrants to provide advanced services over unbundled DLC-delivered loops, making the question of national unbundling rules moot. In the one context where national standards would be appropriate — loop spectrum management — work is already underway under the auspices of the national T1E1.4 standards body to address those issues.

Neither the Commission nor any other regulatory body is equipped to develop standards so as to avoid inhibiting future technological changes in loop functionality. Standard setting is a complicated process that the Commission always should undertake, if at all, with great care; where an industry group is already confronting a problem, the Commission should be especially wary of intervening. In the context of advanced services, there is simply insufficient information to establish rational nationwide standards at this time. Compulsory standards based on incomplete information could misdirect technological growth and thereby impede the deployment of advanced services.

2. Operations Support Systems

The Commission's tentative conclusion that incumbent LECs should provide requesting CLECs with "sufficient detailed information" about a loop to enable the CLEC to determine whether it is capable of supporting the xDSL equipment the CLEC intends to install, *Advanced Services NPRM* ¶ 157, makes sense if limited to what is commonly known as "loop qualification" information — information regarding loop length, loop coils, bridged taps, decibel loss, line carriers, and the like. If the Commission has something additional in mind, serious problems could arise.

Under the Commission's existing rules, an incumbent LEC must provide new entrants with access to OSS for pre-ordering, ordering, and provisioning loops, *Advanced Services Order* ¶ 56. Pre-ordering, in turn, "generally includes those activities that a carrier undertakes to gather and confirm the information necessary to formulate an accurate order for a customer." *Id.* ¶ 56 n.103. The combined effect of these rules is that U S WEST must make available to competitors the information it compiles in conducting its own operations. Thus, if U S WEST were required to resell DSL services, it would have to indicate which advanced services it offers, the offices in which these services are available, the equipment located in such offices, whether a customer qualifies for a particular service in light of considerations such as loop length, and any other information it compiles in the process of serving its own DSL customers. Similarly, a carrier that purchases unbundled access to loops may ascertain from U S WEST facts concerning the loop qualification information referred to above — information U S WEST has available as a result of its own use of loops.

The information U S WEST makes available, however, necessarily concerns the U S WEST loop, not other carriers' DSL technology. U S WEST obviously cannot ensure that its information is "sufficient" for a carrier to determine whether U S WEST's facilities will be compatible with that carrier's DSL technology. The Commission's proposed sufficiency requirement therefore would, if misinterpreted, threaten to turn a an incumbent LEC's legitimate lack of information into a regulatory violation. Moreover, requiring incumbent LECs to gather and confirm loop-related information they do not compile already would run directly contrary to *Iowa Utilities Board*. As the Eighth Circuit recognized, "[t]he fact that . . . unbundled access